



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2004

Ms. YuShan Chang
Assistant City Attorney
City of Houston Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2004-10417A

Dear Ms. Chang:

This office issued Open Records Letter No. 2004-10417 (2004) on December 8, 2004. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 8, 2004. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, found in chapter 552 of the Government Code. Your request was assigned ID# 214377.

The City of Houston (the "city") received a request for the winning and "runner up" proposals submitted by companies seeking a contract with the city to perform arbitrage calculation services. While you raise no exceptions to disclosure on behalf of the city, you indicate that release of the requested information may implicate the proprietary interests of three interested third parties. Accordingly you state, and provide documentation showing, that you notified third parties BondResource Partners, LP ("BondResource"), MuniFinancial, ("MuniFinancial") and First Southwest Company ("First Southwest") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received and considered correspondence from BondResource and we have reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither MuniFinancial nor First Southwest has submitted any comments to this office explaining how release of the information at issue would affect its proprietary interests. Therefore, we have no basis to conclude that these companies have protected proprietary interests in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As you have made no argument on behalf of the city for withholding the submitted information, the information related to MuniFinancial and First Southwest must be released to the requestor.

BondResource asserts that section 552.101 of the Government Code is applicable to portions of its proposal. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Neither the city nor BondResource has asserted any law, and this office is not otherwise aware of any law, under which any of the information at issue is deemed to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the information at issue under this exception.

BondResource also asserts that specified portions of its proposal are excepted from disclosure under section 552.104 of the Government Code. This section excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Section 552.104 protects the interests of governmental bodies in public bidding and other competitive situations, not the proprietary interests of private parties such as BondResource. *See* Open Records Decision No. 592 at 8-9 (1991) (addressing statutory predecessor). As noted, the city has raised no exceptions to disclosure on behalf of the city. We therefore conclude that the city may not withhold any of the submitted information under section 552.104.

BondResource also asserts that section 552.110 of the Government Code is applicable to portions of its proposal. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information whose release would cause a third party substantial competitive harm.

Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the

Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ If a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a third party's claim for exception as valid under that branch if that party establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The third party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983). Having considered BondResource's arguments, we find that it has established a *prima facie* case that client information, which is listed on page one of Tab One of its proposal, and additional client information, which is listed on pages ten and eleven of Tab III of its proposal, is a trade secret for purposes of section 552.110(a); therefore, that information is excepted from disclosure. However, BondResource has not established a *prima facie* case that any of the remaining information is a trade secret; therefore, none of the remaining information in the BondResource proposal is excepted from release under section 552.110(a). *See* Open Records Decision No. 402 (1983).

¹The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Having considered BondResource’s arguments, we find that it has not established that the release of any of the remaining information at issue in its proposal would likely cause substantial competitive harm to BondResource; therefore, none of the information in the BondResource proposal is excepted from release under section 552.110(b). *See* Gov’t Code § 552.110(b); Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary, the city must withhold the client information found on page one of Tab One of BondResource’s proposal, and additional client information found on pages ten and eleven of Tab III of BondResource’s proposal, under section 552.110 of the Government Code. All remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

- This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 214377

Enc. Submitted documents

c: Takashi Iwata
Director, Financial Analysis & Services Group
Hawkins Delafield & Wood LLP
67 Wall Street
New York, New York 10005
(w/o enclosures)

Joan M. DiMarco
BondResource Partners, LP
1735 Market Street, Suite 910
Philadelphia, Pennsylvania 19103-2399
(w/o enclosures)

Frank G. Tripepi
President and CEO
MuniFinancial
27368 Via Industria, Suite 110
Temecula, California 92590
(w/o enclosures)

Randee R. Travis, CPA
Senior Vice President
First Southwest Company
325 North St. Paul Street, Suite 800
Dallas, Texas 75201
(w/o enclosures)